

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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5
6 August Term, 2005
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8 (Argued March 3, 2006

Decided September 15, 2006)

9
10 Docket No. 05-1748-cr
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14 United States of America,

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16 Appellee,

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18 v.

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20 Maxmillian Sloley,

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22 Defendant-Appellant.
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26 Before:

27 WALKER, Chief Judge,
28 CARDAMONE, and SOTOMAYOR, Circuit Judges.
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32 Defendant Maxmillian Sloley appeals from the judgment of
33 conviction and sentence entered on April 1, 2005 in the United
34 States District Court for the Southern District of New York
35 (Pauley, J.), alleging sentencing error and breach of his plea
36 agreement. The district court refused to grant defendant an
37 extra one-level reduction under Guidelines § 3E1.1(b) because the
38 government did not file the required motion requesting such
39 reduction.
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41 Affirmed.
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York, of counsel), for Defendant-Appellant.

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Southern District of New York, New York, New York, of
counsel), for Appellee.

1 CARDAMONE, Circuit Judge:

2 Arguing sentencing error and breach of his plea agreement,
3 defendant Maxmillian Sloley (defendant or appellant), appeals his
4 judgment of conviction and sentence entered April 1, 2005 by the
5 United States District Court for the Southern District of New
6 York (Pauley, J.). The trial court sentenced Sloley to 88 months
7 imprisonment, three years of supervised release, and a \$100
8 special assessment. This sentence was based on defendant's
9 guilty plea to one count of being a felon in possession of a
10 firearm in violation of 18 U.S.C. § 922(g).

11 The district court found that Sloley accepted responsibility
12 for his crime and therefore qualified for a two-level reduction
13 to his sentence under § 3E1.1(a) of the United States Sentencing
14 Guidelines (U.S.S.G. or Guidelines). Judge Pauley refused to
15 grant a reduction under Guidelines § 3E1.1(b). That subsection
16 permits a further one-level decrease for acceptance of
17 responsibility, if other criteria are met, including the filing
18 of a government motion. Here the court did not give the extra
19 reduction because the government did not file the required
20 motion. Sloley claims that the district court's refusal
21 constitutes error. He asserts further the government breached
22 his plea agreement by refusing to file such motion.

23 Because we find no error in the sentence imposed on
24 defendant, we affirm. The supposed inconsistency between the
25 sentencing court's finding for purposes of subsection (a) that
26 Sloley had accepted responsibility and the prosecutor's finding

1 for purposes of subsection (b) that he had not may best be
2 examined by way of an analogy.

3 An actor seeking the lead role in a proposed production
4 impresses the director and gets the part. Later, when the play
5 is staged, the audience is not taken with the actor in that role
6 and shortly thereafter the play closes. The actor like Sloley
7 had to satisfy two entities to achieve complete success. And
8 like the director and the audience, the sentencing court and the
9 prosecutor have a different perspective on what constitutes
10 acceptance of responsibility. The judge makes a finding after
11 hearing a defendant testify, the prosecutor among other factors
12 looks at the timing of the acceptance so as not to have to
13 needlessly waste the government's resources preparing for trial.
14 So like a director looking for a professional actor, and an
15 audience looking for charisma, the court and prosecutor can have
16 different stakes on the same subject. Their seemingly
17 contradictory perspectives on Sloley's acceptance of
18 responsibility is permissible given their different roles in the
19 plea bargaining process.

20 BACKGROUND

21 On September 17, 2003 New York City police officers arrested
22 the driver of an automobile in which Sloley was riding as a
23 passenger at a traffic stop in the Bronx, New York. The officers
24 stopped the vehicle because it was being driven recklessly. The
25 officers found defendant in the automobile in possession of a
26 loaded Browning 9mm semiautomatic pistol. Having been previously

1 convicted on five occasions of being a felon, Sloley pleaded
2 guilty to one count of being a felon in possession of a firearm
3 in violation of 18 U.S.C. § 922(g). Defendant's prior
4 convictions included robbery in the second degree and criminal
5 possession of a controlled substance, criminal impersonation,
6 criminal possession of a weapon, and criminal sale of a
7 controlled substance. The plea agreement provided that if
8 defendant "clearly demonstrates acceptance of responsibility, to
9 the satisfaction of the Government, through his allocution and
10 subsequent conduct prior to the imposition of sentence, a two-
11 level reduction will be warranted, pursuant to U.S.S.G.
12 § 3E1.1(a) [and] an additional one-level reduction will be
13 warranted, pursuant to U.S.S.G. § 3E1.1(b)."

14 Between Sloley's plea and his sentencing, the Supreme Court
15 decided Blakely v. Washington, 542 U.S. 296 (2004), and granted
16 certiorari on United States v. Booker, 543 U.S. 220 (2005).
17 Because of these developments, defendant moved to adjourn
18 sentencing until the impact of these cases was ascertained and
19 declared he should be sentenced according to any new standards
20 set forth by Booker. This led to several letter motions between
21 Sloley's counsel and the government. In one of these letter
22 motions, defendant denied admitting to obstructing justice or
23 committing perjury, although he had made such admissions in his
24 plea agreement.

25 The obstruction of justice and perjury elements arose from
26 an earlier evidentiary hearing at which defendant moved to

1 suppress certain evidence. The government maintains that during
2 his testimony at that hearing, Sloley perjured himself and that
3 such constituted an obstruction of justice. Language to that
4 effect was included in Sloley's plea agreement. Based on
5 defendant's letter motions and denial of having obstructed
6 justice and committed perjury, the government at sentencing
7 refused to file a § 3E1.1(b) motion, averring that it was not
8 satisfied that Sloley had accepted responsibility.

9 Nonetheless, the district court found Sloley had neither
10 committed perjury nor obstructed justice. It found in addition
11 that defendant had accepted responsibility and consequently
12 reduced his offense level by two levels under U.S.S.G.
13 § 3E1.1(a). But because the government did not file a § 3E1.1(b)
14 motion, the sentencing court did not grant defendant an
15 additional one-level reduction. Accordingly, it sentenced him as
16 recited a moment ago. From the judgment of conviction and
17 sentence, Sloley appeals.

18 DISCUSSION

19 Appellant makes two inter-related arguments. He contends
20 first that the district court erred in interpreting § 3E1.1(b) to
21 require a government motion even when the court has independently
22 found timely acceptance of responsibility under the prior
23 subsection § 3E1.1(a). He asserts second that the government
24 breached his plea agreement by refusing to file a § 3E1.1(b)
25 motion. We are mindful that this appeal presents the first
26 opportunity for our Circuit to address the application of

1 Guidelines § 3E1.1 as amended by the Prosecutorial Remedies and
2 Tools Against Exploitation of Children Today Act of 2003 (PROTECT
3 Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671-72 (2003).
4 We address each of Sloley's arguments.

5 Standard of Review

6 While findings of fact at sentencing are reviewed for clear
7 error, the district court's interpretation of a Guidelines
8 provision is reviewed de novo. United States v. Rubenstein, 403
9 F.3d 93, 99 (2d Cir. 2005).

10 A. Applicable Law -- Acceptance of Responsibility
11 Under Guidelines § 3E1.1(a) and (b)
12

13 The Guidelines provide for reductions to a defendant's
14 offense level when the defendant accepts responsibility for his
15 crimes. See U.S.S.G. § 3E1.1. Subsection (a) of Guidelines
16 § 3E1.1 states that if a defendant "clearly demonstrates
17 acceptance of responsibility for his offense," the court should
18 decrease the offense level by two levels. U.S.S.G. § 3E1.1(a).
19 Subsection (b) provides for a further one-level decrease if (1)
20 the defendant qualifies under subsection (a) -- i.e., he is found
21 to have accepted responsibility by the court, (2) the defendant's
22 offense level is a level 16 or greater, and (3) the government
23 files a "motion . . . stating that the defendant [had timely
24 notified] authorities of his intention to enter a plea of guilty
25 thereby permitting the government to avoid preparing for trial
26 and permitting the government and the court to allocate their
27 resources efficiently" U.S.S.G. § 3E1.1(b). Application

1 Note 6 to § 3E1.1 explains that "[b]ecause the Government is in
2 the best position to determine whether the defendant has assisted
3 authorities in a manner that avoids preparing for trial, an
4 adjustment under subsection (b) may only be granted upon a formal
5 motion by the Government at the time of sentencing." U.S.S.G.
6 § 3E1.1 cmt. n.6. In addition, "timeliness of [a] defendant's
7 acceptance of responsibility is a consideration under" both
8 subsections (a) and (b). Id.

9 Appellant contends that because the district court found
10 that he timely accepted responsibility under subsection (a), it
11 was compelled as a matter of logic and consistency to grant a
12 further reduction under subsection (b). To do otherwise, Sloley
13 insists, results in an improper contradiction, that is, the
14 court's finding of acceptance of responsibility is in direct
15 conflict with the government's finding of no acceptance of
16 responsibility. Appellant's argument is significantly flawed,
17 and therefore we cannot adopt it.

18 First, appellant ignores the language of § 3E1.1(b) and its
19 accompanying Application Note 6, which explains that "an
20 adjustment under subsection (b) may only be granted upon formal
21 motion by the Government." U.S.S.G. § 3E1.1 cmt. n.6 (emphasis
22 added). We follow other circuits in giving the Guidelines
23 language its plain meaning and force and hold that -- subject to
24 the narrow limitations we discuss in a moment -- a government
25 motion is a necessary prerequisite to the additional one-level
26 decrease under Guidelines § 3E1.1(b). See, e.g., United States

1 v. Moreno-Trevino, 432 F.3d 1181, 1185-86 (10th Cir. 2005);
2 United States v. Wattree, 431 F.3d 618, 623-24 (8th Cir. 2005);
3 United States v. Smith, 429 F.3d 620, 628 (6th Cir. 2005).

4 Second, accepting Sloley's logic would render the
5 requirement of a government motion under subsection (b) a
6 nullity. It cannot be that every time a sentencing court makes a
7 finding of acceptance of responsibility a government motion
8 would, as a matter of law, have to be filed. If that were the
9 case then the Guidelines would not have provided for a government
10 motion. Section 3E1.1 is crafted and structured in a manner that
11 divides the power to reduce a defendant's offense level for
12 acceptance of responsibility between the sentencing court and the
13 prosecutor. Such a division of power between the judicial and
14 executive branches implicitly contemplates situations in which a
15 court may find acceptance of responsibility while the government
16 prosecutor may not. The inherent contradiction upon which Sloley
17 bases his argument is therefore not improper, but actually within
18 the contemplation of Congress and the ambit of the Guidelines, as
19 we explained earlier in our analogy.

20 Finally, the necessity of a government motion under
21 subsection (b) becomes clearer when we examine the subsection's
22 recent history. Prior to 2003 and the passage of the PROTECT
23 Act, subsection (b) did not require a government motion for the
24 additional reduction to apply. The power to lower a defendant's
25 offense level was vested solely in the judiciary. If a court
26 found a defendant had accepted responsibility and provided timely

1 notice of intent to plead guilty, the reduction under subsection
2 (b) was compulsory and not a matter of judicial discretion. See
3 United States v. Rood, 281 F.3d 353, 356-57 (2d Cir. 2002)
4 (noting under old version of subsection (b), once court found
5 qualification under subsection (a) and timely notice of intent to
6 plea, "[a]pplication of subsection (b) is not discretionary").

7 But the PROTECT Act altered that rule by amending the
8 subsection and adding the further element of a prosecutor's
9 motion, thereby making qualification for an additional reduction
10 under subsection (b) more difficult. See United States v. Borer,
11 412 F.3d 987, 991 (8th Cir. 2005) ("The PROTECT Act amendment
12 made it materially more difficult for [defendant] to earn a
13 reduction for acceptance of responsibility by adding a
14 requirement that the government authorize the court to grant a
15 third level reduction."). Appellant may have had an easier path
16 toward the extra reduction under the old version of § 3E1.1(b),
17 but Congress' aim in amending the provision makes plain that
18 under the new version both the court and the government must be
19 satisfied that the acceptance of responsibility is genuine.

20 This does not mean, however, that a prosecutor's refusal to
21 file the motion is a matter of such broad discretion as to be
22 beyond review. A prosecutor's discretion under § 3E1.1(b) is
23 limited by several concerns. We pose then: On what basis can a
24 defendant challenge a prosecutor's refusal to file a § 3E1.1(b)
25 motion? While this question is one of first impression, we have
26 a compass to guide us.

1 For insight we look to case law governing Guidelines § 5K1.1
2 that grants analogous discretion to prosecutors in filing motions
3 that permit a court to decrease a sentence. Under that
4 provision, "[u]pon motion of the government stating that the
5 defendant has provided substantial assistance in the
6 investigation or prosecution of another person . . . the court
7 may depart from the guidelines." U.S.S.G. § 5K1.1. We read
8 § 3E1.1(b) as we do § 5K1.1 to invest the government with a
9 power, not a duty, to file or not to file a motion. See Wade v.
10 United States, 504 U.S. 181, 185 (1992). Similarly, under
11 subsection (b) of § 3E1.1, a prosecutor may file a motion, but is
12 not required to do so, even when the court has found that a
13 defendant has timely notified the prosecutor of his intent to
14 plead guilty, and accepted responsibility for his crimes. See
15 U.S.S.G. § 3E1.1(b) cmt. n.3 ("A defendant who enters a guilty
16 plea is not entitled to an adjustment under [§ 3E1.1] as a matter
17 of right."); id., cmt. n.6 ("[A]n adjustment under subsection (b)
18 may only be granted upon a formal motion by the Government at the
19 time of sentencing").

20 That said, we believe a prosecutor's discretion under
21 § 3E1.1(b), although broad in scope, has some limitation. See
22 United States v. Resto, 74 F.3d 22, 26 (2d Cir. 1996). It is
23 subject, for example, to the same limits to which a prosecutor's
24 discretion under § 5K1.1 is subject. That is, in all cases, a
25 prosecutor cannot refuse to move on the basis of an
26 unconstitutional motive, such as a defendant's race or religion.

1 Wade, 504 U.S. at 185-86; see United States v. Campo, 140 F.3d
2 415, 419-20 (2d Cir. 1998) (per curiam); United States v.
3 Leonard, 50 F.3d 1152, 1157 (2d Cir. 1995). Moreover, when the
4 terms of a plea agreement leave the discretion to file the motion
5 solely in the hands of the government, our review of the
6 government's decision is more searching. United States v. Roe,
7 445 F.3d 202, 207 (2d Cir. 2006); Leonard, 50 F.3d at 1157. In
8 such a case, we may review the plea agreement to see if the
9 government has "made its determination in good faith." Roe, 445
10 F.3d at 207; see Leonard, 50 F.3d at 1157 ("[A] court may review
11 the government's treatment of a plea agreement . . . only to
12 determine whether it has acted in 'good faith'"); United States
13 v. Khan, 920 F.2d 1100, 1105 (2d Cir. 1990) ("[T]he prosecution's
14 determination . . . may not be reached dishonestly or in bad
15 faith."). With these precepts in mind, we turn to the facts of
16 Sloley's case.

17 B. The Present Case

18 1. No Unconstitutional Motive

19 The record before us presents no evidence that
20 unconstitutional motive prompted the prosecutor to withhold the
21 § 3E1.1(b) motion. Sloley maintains the government refused to
22 file because he argued in letter motions to the district court
23 that he be sentenced in a constitutional manner under Booker. We
24 do not doubt that if such a letter prompted the refusal to file
25 that such a motive would be unlawful and grounds for reproach,
26 but those are not the facts of the present case. There is

1 nothing in the record that demonstrates the prosecutor here was
2 motivated by appellant's request to be sentenced in a
3 constitutional manner. Rather, the record shows that Sloley's
4 reneging on his admission to perjury -- an admission he had
5 earlier made in the plea agreement -- is what led the government
6 to conclude that he had not accepted responsibility to the
7 prosecutor's satisfaction.

8 2. No Bad Faith and No Breach of the Plea Agreement

9 Nor do we see any evidence of bad faith in the prosecutor's
10 refusal to make the motion. As a consequence, the government did
11 not breach Sloley's plea agreement. The agreement provides that
12 "[a]ssuming the defendant clearly demonstrates acceptance of
13 responsibility, to the satisfaction of the Government . . . a
14 two-level reduction will be warranted pursuant to U.S.S.G.
15 § 3E1.1.(a) [and] an additional level reduction will be
16 warranted, pursuant to U.S.S.G. § 3E1.1(b)." The language "to
17 the satisfaction of the Government" is unambiguous: It reserves
18 the decision to file the § 3E1.1(b) motion to the government's
19 discretion. See United States v. Cimino, 381 F.3d 124, 127 (2d
20 Cir. 2004) ("[P]lea agreements are subject to ordinary contract
21 law principles, except that any ambiguity is resolved strictly
22 against the government.").

23 As noted, in such a case we review the government's decision
24 to withhold the motion only to ascertain if that decision was
25 reached in good faith. We agree with the district court that the
26 government's refusal to file was made in good faith. The record

1 shows that the prosecutor was honestly dissatisfied, Khan, 920
2 F.2d at 1105, with appellant's acceptance of responsibility.
3 Indeed, Sloley challenged admissions he had already attested to
4 in his plea agreement. Accordingly, the government had a good
5 faith basis in finding no acceptance of responsibility by the
6 defendant. As a consequence, its refusal to make a § 3E1.1(b)
7 motion was justified.

8 CONCLUSION

9 For the foregoing reasons we find neither sentencing error
10 nor breach of defendant's plea agreement. The judgment of
11 conviction and sentence is therefore affirmed.